9-30-2013

Peterson v. Peterson Respondent's Brief Dckt. 41017

IN THE SUPREME COURT OF THE STATE OF IDAHO

DEBRA A. PETERSON, Plaintiff-Respondent, vs. MYRON G. PETERSON, Defendant, and STATE OF IDAHO, DEPARTMENT OF HEALTH AND WELFARE, CHILD SUPPORT SERVICES, Intervenor- Appellant.	)	Supreme Court Docket 41017-2013 Canyon County No. 1985-6810

RESPONDENT'S BRIEF

APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

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TABLE OF CONTENTS

I. TABLE OF CONTENTS ii

II. TABLE OF CASES AND AUTHORITIES iv

III. STATEMENT OF THE CASE 1

A. Nature of the Case 1

B. Course of Proceedings 1

C. Concise Statement of Facts 4

IV. ADDITIONAL ISSUES PRESENTED ON APPEAL 5

A. Whether the plain and unambiguous language of §§10-1110 and 10-1111(2) as amended in 2011, regardless of other possible indicators of legislative intent, precludes the renewal of a child support judgment against Plaintiff-Appellant because such judgment had expired subsequent to the expiration of the lien created by §10-1110, and could only be renewed so long as the renewal occurred prior to the expiration of the lien as the District Court concluded 5

B. Whether Plaintiff-Appellant had a vested right in the statute of limitations defense to DHW's actions which cannot, as a matter of law, be taken away by subsequent legislation 6

V. ARGUMENT 6

A. THE CLEAR AND UNAMBIGUOUS LANGUAGE OF THE APPLICABLE STATUTE OF LIMITATIONS IN §10-1111, IDAHO CODE, MANDATES DISMISSAL OF THE STATE'S ACTION TO RENEW THE UNDERLYING JUDGMENT 6

1. The Controlling Statutory Language is Clear and Unambiguous That No Judgment for Child Support Can be Renewed Unless The Motion Contemplated by §10-1111 Is Filed Before the Expiration of the Lien Created by §10-1110, Which Was Not Done in This Case 6

2. Even if the so-called "Retroactivity Provision" of the 2011 amendments is held by this Court to be authoritative by DHW, it is not binding on the District Court, and even if this Court concludes it was binding, it can be harmonized with the other provisions of the amendments without "Palpable Absurdity" and therefore does not require a result different from the District Court Order 9

B. NOTWITHSTANDING THE 2011 AMENDMENTS TO §§10-1110 AND 10-1111, PLAINTIFF HAD A VESTED RIGHT IN THE STATUTE OF LIMITATIONS DEFENSE EXISTING PRIOR TO THE 2011 AMENDMENTS WHICH CANNOT BE TAKEN AWAY BY SUBSEQUENT LEGISLATION AS A MATTER OF LAW 13

VI. CONCLUSION 19

II. TABLE OF CASES AND AUTHORITIES

Cases:

Ada County v. Gibson, 126 Idaho 854, 856, 891 P.2d 801, 801 (Ct. App. 1995) 11

Ada County Assessor v. Roman Catholic Diocese of Boise,

123 Idaho 425, 428, 849 P.2d 98, 101 (1993) 7

Ben Lomond, Inc. v. City of Idaho Falls, Idaho, 448 P.2d 209 (1986) 17

Corbett v. Gen'l Eng'g & Mach. Co., 160 Fla. 879, 37 So.2d 161, 162 (1948) 16

Corporation of Presiding Bishop v. Ada County, 123 Idaho 410, 416, 849 P.2d 83, 89 (1993) . 8

Davis & McMillan v. Industrial Accident Comm'n, 198 Cal. 631, 246 P. 1046, 1048 (1926) . . 16

Dunham v. Davis, 229 S.C. 29, 91 S.E.2d 716, 718-19 (1956) 16

Engen v. James, 92 Idaho 690, 448 P.2d 977 (1969) 17

Hidden Springs Trout Ranch, Inc., In the matter of, v. Allred,

102 Idaho 623, 636 P.2d 745 (1981) 16, 17

Leliefeld v. Johnson, 104 Idaho 357, 659 P.2d 111 (1983), appeal after remand,

111 Idaho 897, 728 P.2d 1306 (1986) 11

Noble v. Fisher, Idaho, 894 P.2d 118-123 (1995) 4

Olsen v. J. A. Freeman Co., Idaho, 117 Idaho 706, 791 P.2d 1285 (1990) 17

Payette River Property Owners Ass'n v. Board, 132 Idaho 551, 976 P.2d 477, 483 (1999) . . . 11

Roark v. Crabtree, Utah, 893 P.2d 1058 (1995) 14, 15, 16

Rosenberg v. Town of Bergen, 61 N.J. 190, 293 A.2d 662, 667 (1972) 17

Spitcaufsky v. Hatten, 365 Mo. 94, 182 S.W.2d 86, 104 (1944), *overruled on other grounds,*

Director of Dept' of Revenue v. Parcels of Land Encumbered with Delinquent

Tax Liens, 555 S.W.2d 293, 297 (Mo. 1977) 16

State v. Hagerman Water Right Owners, Inc., 130 Idaho 727, 732, 947 P.2d 400, 404 (1997) . . 8

State v. Hodgson, 740 P.2d 848 (1987) 18

State ex rel. Lisby v. Lisby, 126 Idaho 776, 779, 890 P.2d 727, 730 (1995) 8

State v. McCoy, 128 Idaho 362, 365, 913 P.2d 578, 581 (1995) 8

State v. O'Neill, Idaho, 796 P.2d 121 (1990) 18

State v. Rhode, Idaho, 988 P.2d 685, 588 (1999) 8

Thomas v. Worthington, 132 Idaho 825, 979 P.2d 1183, 1187 (1999) 8

Walborn v. Walborn, 120 Idaho 494, 499-500, 817 P.2d 160, 165-166 (1991) 4

Waldrop v. Hodges, 230 N.C. 370, 53 S.E.2d 263, 265 (1949) 16

Statutes:

Idaho Code §5-245 . . . . . 1, 2, 9, 11

Idaho Code §10-1110 . . . . . 1, 2, 3, 4, 5, 6, 7, 8, 10, 11, 19

Idaho Code §10-1111 . . . . . 1, 2, 5, 6, 7, 8, 10, 11, 19

Other:

51 Am.Jur.2d *limitation of actions* §44 (1970) 16

III. STATEMENT OF THE CASE

A. Nature of the Case.

This case is domestic in nature, and originated in the context of a divorce between the two named parties. This appeal arises from the attempts by the Idaho Department of Health and Welfare, Bureau of Child Support ("DHW") to collect unpaid child support on behalf of Defendant-Respondent from Plaintiff-Appellant which Plaintiff-Appellant contends are barred by the applicable statute of limitations.

B. Course of Proceedings.

On January 9, 1998 the District Court ordered Plaintiff-Appellant to pay child support (the "Child Support Order") for the parties' child Erik B. Peterson ("Erik"), whose date of birth is [redacted]. Erik became emancipated on April 20, 2002 when he became 18 years of age; therefore, any child support allegedly owed by Plaintiff-Appellant had to have accrued between January 9, 1998, the date of the Child Support Order, and [redacted], Erik's 18th birthday. The amount at issue is $7,125.01.

The applicable statute of limitations relating to the collection of child support arrearages existing prior to amendments passed in 2011 was §5-245, Idaho Code, which provided in pertinent part that

> [a]n action or proceeding to collect child support arrearages must be commenced within five (5) years after the child reaches the age of majority . . .

In 2011 the Legislature passed Idaho Session Laws Chapter 104, which altered the existing child support collection scheme by amending §5-245, §10-1110, and §10-1111 (hereafter collectively referred to as the "Amendments").

The 2011 amendment of §5-245 provides in pertinent part that

> [a]n action or proceeding to collect child support arrearages, arising under an Idaho child support order, can be commenced at any time prior to the expiration of the resulting judgment or any renewal thereof. . . .

The amendment to §10-1110, among other things, allows for the creation of a lien against real property which arises from child support arrearages but imposes a five (5) year limitation of the lien measured from the death or emancipation of the child "unless the underlying judgment is renewed . . .." The amendment to §10-1111, among other things, purports to authorize DHW to renew "any Idaho child support judgment currently being enforced by [DHW], which otherwise could be deemed to have expired since July 1, 1995."

Based on the Amendments, DHW filed its Motion for Entry of Renewed Child Support Judgment (the "Motion to Renew Judgment") on or about August 8, 2011, which is more than four (4) years after the expiration of the statute of limitations bar in §5-245 prior to the Amendments.

In response, Debra filed her Motion to Dismiss and in the Alternative for Summary Judgment (the "Motion to Dismiss") on or about December 8, 2011, wherein she argued, *inter alia*, that (1) under the language of the Amendments DHW is not entitled to resurrect the barred Child Support Order and (2) Plaintiff's right to assert the defense of statute of limitations is a vested right which cannot be taken from her by retroactive or retrospective legislation.

The Magistrate Judge heard the Motion to Renew Judgment and the Motion to Dismiss on February 17, 2012, at which time the Court verbally denied the Motion to Dismiss. On or about March 1, 2012 Debra filed a Motion for Reconsideration, which the Court heard and denied on May 24, 2012. As a result of the hearing on the Motion for Reconsideration, the Magistrate

Judge signed and entered its Final Order on Motion for Renewed Judgment (the "Final Order") on July 10, 2012.

Debra appealed the Final Order to the District Court acting in its appellate capacity, which issued its Order on Motion to File the Renewed Judgment and Order of Remand on April 19, 2013 (the "District Court Order") in which it reversed the Final Order and remanded the case to the Magistrate's Court "for proceedings consistent herewith." The District Court Order included the following:

> The statutes [Idaho Code §10-1110 and 10-1111] plainly and clearly set forth the provisions relating to the length of time a judgment ordering child support is valid and the process to renew that judgment. Based on the clear and unambiguous language of section 10-1110, a civil judgment expires unless a party, before that expiration, moves the court to renew the judgment. [citing] Bach v. Dawson, 152 Idaho 237, 239, 268, P.3d 1189, 1191 (Ct. App. 2012). ("in short, a civil judgment–whether or not a lien is actually recorded–will last for five years, at which time it expires, unless a party, before that expiration, makes a motion to renew and such motion is granted by the court.") Idaho Code section 10-1111 simply allows any judgment entered pursuant to I.C. §10-1110 to be renewed, so long as the renewal occurs prior to the expiration of the lien.

The District Court declined to be persuaded by the DHW's arguments that the legislature clearly expressed its intent in Senate Bill 110, 2001 Session Laws, Chapter 104 that the time in which child support judgments could be renewed was to be retroactively extended. Instead, the District Court concluded that because the statutes in question were clear and unambiguous, the District Court could not engage in statutory construction.

Because the District Court reversed the Final Order on the basis that the statutes in question were clear and unambiguous, it declined to rule on Debra's vested rights argument. Debra's vested rights claim is also raised in this appeal as an "additional issue."

C. Concise Statement of Facts.

1. The parties to this action are the parents of Erik B. Peterson, born April 20, 1984 ("Erik"), who is presently twenty-eight (28) years of age.

2. Debra was ordered to pay child support to Defendant on behalf of Erik pursuant to an order entered on January 9, 1998 by the Third District Court of Canyon County, Idaho in this proceeding CV-85-06810-C (the "Child Support Order.") (Affidavit of Stephanie West In Support of Motion for Renewed Child Support Judgment dated August 4, 2011 (the "Affidavit"), ¶ 2)

3. Erik is the "last child for whom support is owed under the judgment" as contemplated by §10-1110, Idaho Code, as amended.

4. The Idaho Department of Health and Welfare, Bureau of Child Support ("DHW") purportedly began attempts to enforce the Child Support Order on January 26, 1998. Affidavit, ¶ 3.

5. The amount of arrearages at issue is $7,125.01 as of August 1, 2011.

6. Erik became emancipated[1] not later than April 20, 2002 when he reached the age of 18 years. Accordingly, any amounts of child support alleged owed by Plaintiff accrued between January 9, 1998 and April 20, 2002.

7. The applicable Statute of Limitations in effect prior to the amendments

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[1]The triggering event for the end of the statute of limitations on the lien arising from §10-1110, Idaho Code, is based upon the child's "emancipation," which could conceivably occur prior to the child's 18th birthday. See definition of "emancipation" in Black's Law Dictionary, 4th Ed., (Rev.1968) For purposes of the pending motion, however, Debra does not contend that Erik was emancipated prior to his 18th birthday, which in Idaho marks the end of Plaintiff's support obligations. See, for example, *Noble v. Fisher*, Idaho, 894 P.2d 118, 123 (1995) [citing] *Walborn v. Walborn,* 120 Idaho 494, 499-500, 817 P.2d 160, 165-66 (1991)

passed by the 2011 Idaho Legislature disallowed the commencement of "[a]n action or proceeding to collect child support arrearages"[2] after April 20, 2007, which is five (5) years after Erik reached his majority.

8. The instant Motion for Entry of Renewed Child Support Judgment dated August 4, 2011 (the "Motion") was filed on or about August 8, 2011, which is more than four (4) years after the expiration of the statute of limitations in effect on April 20, 2007 and thereafter.

9. The Motion in pertinent part "is brought pursuant to Idaho Code §10-1111 as amended and modified by 2011 Idaho Session Laws §§ 104 and 331, which specifically allows for the Idaho Department of Health and Welfare, Bureau of Child Support to renew any Idaho child support judgment currently being enforced by the Department, which otherwise could be deemed to have expired since July 1, 1995."

IV. ADDITIONAL ISSUES PRESENTED ON APPEAL

A. Whether the plain and unambiguous language of §§10-1110 and 10-1111(2) as amended in 2011, regardless of other possible indicators of legislative intent, precludes the renewal of a child support judgment against Plaintiff-Appellant because such judgment had expired subsequent to the expiration of the lien created by §10-1110, and could only be renewed so long as the renewal occurred prior to the expiration of the lien as the District Court concluded.

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[2]Section 5-245, Idaho Code.

B. Whether Plaintiff-Appellant had a vested right in the statute of limitations defense to DHW's actions which cannot, as a matter of law, be taken away by subsequent legislation.

V. ARGUMENT

A. THE CLEAR AND UNAMBIGUOUS LANGUAGE OF §§11-1110 and 11-1111 COLLECTIVELY EXPRESSES THE LEGISLATURE'S INTENT THAT ONLY THOSE ACTIONS FILED BEFORE THE EXPIRATION OF THE LIEN CREATED BY §10-1110 ARE SUBJECT TO RENEWAL, AND THE DISTRICT COURT'S RELIANCE UPON THAT LANGUAGE TO DISMISS THE STATE'S ACTION TO RENEW THE UNDERLYING JUDGMENT WAS PROPER

1. The Controlling Statutory Language is Clear and Unambiguous that No Judgment for Child Support Can be Renewed Unless the Motion Contemplated by §10-1111 Is Filed Before the Expiration of the Lien Created by §10-1110, Which Was Not Done in This Case

Legislative intent in Idaho is determined first from the actual language of the statute in question. If the language of the statute is clear and unambiguous, it is the duty of the Court to forego the application of any rules of statutory construction and enforce the statute according to its terms. Indeed, unless the result is "palpably absurd" this Court must assume that the Legislature meant what it said and enforce it as written. Only if the statute is ambiguous, *i.e.*, if reasonable minds may differ or be uncertain about its meaning, can the Court engage any rules of statutory construction. Plaintiff believes that the applicable statutory language is clear and

unambiguous and does not allow the renewal of the judgment against her sought by the DHW.

Amended Section 10-1111(2)[3] is restated in its entirety as follows, with the provision directly relating to this matter emphasized by underlining:

> Unless the judgment has been satisfied, and prior to the expiration of the lien created in section 10-1110, Idaho Code, or any renewal thereof, a court that has entered a judgment for child support may, upon motion, renew such judgment. The renewed judgment may be enforced in the same manner as the original judgment, and the lien established thereby shall continue for ten (10) years from the date of the renewed judgment.

"The lien" referred to in §10-1111 is found in the following language from §10-1110[4], the parts directly relating to this matter again emphasized by underlining

> A transcript or abstract of any judgment or decree of any court of this state . . . may be recorded with the recorder of any county of this state, who shall immediately record and docket the same as by law provided, and from the time of such recording, and not before, the judgment so recorded becomes a lien upon all real property of the judgment debtor in the county, not exempt from execution, owned by him at the time or acquired afterwards at any time prior to the expiration of the lien; provided that where a transcript or abstract is recorded of any judgment or decree of divorce or separate maintenance making provision for installment or periodic payment of sums for maintenance of children . . ., such judgment or decree shall be a lien only in an amount for payments so provided, delinquent or not made when due. . . . A lien arising from the delinquency of a payment due under a judgment for support of a child issued by an Idaho court continues until five (5) years after the death or emancipation of the last child for whom support is owed under the judgment unless the underlying judgment is renewed, ... [emphasis added]

It is the intent of the Legislature that is paramount,[5] and where the statutory language is

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[3]As amended by the 2011 Legislature.

[4]As amended by the 2011 Legislature.

[5]See *Ada County Assessor v. Roman Catholic Diocese of Boise*, 123 Idaho 425, 428, 849 P.2d 98, 101 (1993)

plain and unambiguous, as Plaintiff asserts this language is, "this Court must give effect to the statute as written, without engaging in statutory construction." *State v. Rhode*, Idaho, 988 P.2d 685, 688 (1999) [citing] *State v. McCoy*, 128 Idaho 362, 365, 913 P.2d 578, 581 (1995). "Unless the result is palpably absurd," this Court must assume that the Legislature said what it meant and meant what it said. *Rhode* at 688 [citing] *Miller v. State*, 110 Idaho 298, 299, 715 P.2d 968, 969 (1986). If the pertinent statutory language is clear and unambiguous, the Court is not allowed to engage in statutory construction. See *Thomas v. Worthington*, 132 Idaho 825, 979 P.2d 1183, 1187 (1999), wherein the Court stated as follows:

> Statutory interpretation begins with an examination of the literal words of the statute. [citing] *State ex rel. Lisby v. Lisby*, 126 Idaho, 776, 779, 890 P.2d 727, 730 (1995). The language of the statute is to be given its plain, obvious and rational meaning. *Id.* In attempting to discern and implement the intent of the legislature, the Court may seek edification from the statute's legislative history and contemporaneous context at enaction. [citing] *Corporation of Presiding Bishop v. Ada County*, 123 Idaho 410, 416, 849 P.2d 83, 89 (1993). However, if statutory language is clear and unambiguous, the Court need merely apply the statute without engaging in any statutory construction. [citing] *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 727, 732, 947 P.2d 400, 404 (1997).

The statutory language of §10-1111(2) clearly and plainly states that a judgment for child support can only be renewed, if at all, prior to the expiration of the lien created in section 10-1110. The statutory language of §10-1110, in turn, clearly and plainly states that the lien it creates is valid only for five (5) years after Erik's emancipation, which at the latest was April 20, 2007. Therefore, the clear and plain language of these statutes as amended in 2011 allows a renewal of the judgment against Plaintiff ***only*** if it occurred prior to April 20, 2007 at the latest.

Because DHW's Motion was filed more than four (4) after the expiration of the lien, the renewal is time-barred and it was reversible error for the Magistrate Judge to rule otherwise.[6]

2. Even if the so-called "Retroactivity Provision" of the 2011 amendments is held by this Court to be authoritative as argued by DHW, it is not binding on the District Court, and even if this Court concludes it was binding, it can be harmonized with the other provisions of the amendment without "Palpable Absurdity" and therefore does not require a result different from the District Court Order

The State attempts to make much of the District Court's decision to rely only upon the unambiguous language of 10-1110 and 10-1111 as the statement of legislative intent, rather than to consider "the language of the Senate bill or any other portion of the legislative history." In so doing, the first statement it makes on p. 4 of its Opening Brief is that the legislative intent of the Retroactivity Provision was "to remedy a situation in which unscrupulous parents were avoiding paying their support obligations until such time that the underlying support obligations became uncollectable." There is no known support for the statement, and DHW does not mention it again, but Debra does not wish to allow the statement to go unchallenged and urges the Court to ignore the statement unless DHW can point to some support in the record, presuming this Court finds the issue relevant to begin with.

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[6]Also pertinent to this issue is the Legislature's 2011 amendment to §5-245, Idaho Code, which provides in pertinent part that [a]n action or proceeding to collect child support arrearages, arising under an Idaho child support order, can be commenced at any time prior to the expiration of the resulting judgment or any renewal thereof. . . . [emphasis added], demonstrating that regardless of all other factors, the Legislature recognized that some judgments for arrearages in child support payments were unenforceable, regardless of the 2011 amendments.

DHW argued below and now argues before this Court that the following language of Idaho Session Laws, 2011, Chapter 104 (5), pp. 268-269 evidences the Legislature's intent to override and ignore the clear and unambiguous statutory language quoted above in an attempt to make all judgments subject to renewal, regardless of whether they are barred by the 5-year rule of the lien created by §10-1111 and recognized by §10-1110 or not:

> . . . this act shall be in full force and effect . . . retroactively to July 1, 1995, and shall apply to all orders currently being enforced by the . . . Department . . . such that any Idaho judgment for child support that would otherwise have expired since July 1, 1995, may be renewed on or before December 30, 2011.[7]

Debra believes DHW's position makes no sense, because it requires the conclusion that the amendments in §10-1110 and §10-1111, which carve out exceptions for child support judgments already expired, are meaningless. It is clear from the above language that "this act," [whatever that act is], "shall apply to all orders currently being enforced [by DHW]." "This act" obviously refers to the 2011 amendments discussed above, and included in and integral to those amendments is the provision in §10-1111(2) that forbids the renewal of a judgment for child support unless the order renewing the judgment occurs "prior to the expiration of the lien created in section 10-1110, Idaho code, or any renewal thereof . . .." [§10-1111(2)] In other words, the retroactive language of the amendments makes "the act" applicable to "any" judgment for child support "that would otherwise have expired since July 1, 1995" [as long as the lien created by §10-1110 and applied by §10-1111 has not yet expired].

Furthermore, Section 5 of the Session Laws states that the amendments are applicable to "any" judgment for child support – not "all" judgments for child support. If the Legislature had

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[7]DHW Reply Brief in Support of Motion for Entry of Renewed Child Support Judgment dated February 15, 2012, p. 3.

intended to make the Amendment applicable to "all" judgments for child support without exception, it could easily have so stated, but did not. Reading the provisions of §5-245, §10-1110, §10-1111(2), and Section (5) of the Session Laws together and harmonizing them with each other makes it clear that Section 5 makes the Amendments applicable only to Idaho child support judgments where the lien created by §10-1110 is still in effect, and not otherwise.[8]

It is certainly not "palpably absurd" as discussed in the *Rhode* case above to conclude that the 2011 Legislature intended to limit the retroactive application of the Amendment to circumstances where the lien created by §10-1110 and applied by §10-1111 has not yet expired. Indeed, part of the Amendment itself in §10-1111(2) was to include the "prior to the expiration of the lien created in section 10-1110" language. Therefore, at most there is a difference in how DHW and Debra interpret the statutory language of the Amendments, and it is important to note that mere differing interpretations of the statutory language do not establish ambiguity. See, for example, *Payette River Property Owners Ass'n v. Board*, 132 Idaho 551, 976 P.2d 477, 483 (1999). Ambiguity is established, if at all, where "reasonable minds might differ or be uncertain as to its meaning." *Payette River* at 483 [citing] *Ada County v. Gibson*, 126 Idaho 854, 856, 891 P.2d 801, 801 (Ct.App.1995). The operative statutory language of the Amendments quoted above is so clear and unambiguous that reasonable minds cannot differ or be uncertain about its meaning.

Notwithstanding the clear and unambiguous statements of the Legislature in the amendments themselves, DHW points to the case of *Jen-Rath Co., Inc. v. KIT Manufacturing Co.*, 137 Idaho 330, 335, 48 P.3d 659 (2002) and argues that in that case "the Supreme Court has

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[8]The statute must be construed as a whole. *Leliefeld v. Johnson*, 104 Idaho 357, 659 P.2d 111 (1983), appeal after remand, 111 Idaho 897, 728 P.2d 1306 (1986);

made it clear that all provisions of enacting session laws are authoritative" (Appellants' Brief at 5). DHW extrapolates that conclusion from this Court's statement that "[t]he [Official] Comments [to I.C. §28-2-309] are not authoritative, because they were not contained in the session law that adopted I.C. §38-2-309" (Appellant's Brief at 5, citing 48 P.3d at 665). Debra disagrees with DHW's logical tautology for at least the following reasons:

First, Debra believes that DHW is confusing "authoritative" with "binding." The former means "having or arising from authority," "official," "of acknowledged accuracy or excellence," "highly reliable," and/or "wielding authority."[9] Noticeably absent from this list is the word "binding." As the District Court stated, "because the language of the statute is plain and unambiguous, there is no ability of this court to look to the language of the Senate bill or any other portion of the legislative history" [footnote omitted] (District Court Order, p. 5).

Second, just because this Court in one instance relating to Article 2 of the UCC stated that Official Comments were ***not*** authoritative because they were not enacted as part of the session laws does not automatically mean that the retroactivity provision in this case is authoritative in an entirely different context. DHW has presented no authority that UCC Official Comments, which appear to follow every UCC section, are so similar to the retroactivity provision that both should be similarly construed and given the same weight, and even if DHW's argument is persuasive on that point, it in no way explains why being merely "authoritative" somehow evolves into being "binding," as Debra has discussed in the section immediately above.

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[9] http://www.thefreedictionary.com/authoritative

B. NOTWITHSTANDING THE 2011 AMENDMENTS TO §§ 5-245, 10-1110 AND 10-1111, PLAINTIFF HAD A VESTED RIGHT IN THE STATUTE OF LIMITATIONS DEFENSE EXISTING PRIOR TO THE 2011 AMENDMENTS WHICH CANNOT BE TAKEN AWAY BY SUBSEQUENT LEGISLATION AS A MATTER OF LAW

Debra's vested right to assert the expired statute of limitations as a bar to DHW's collection efforts is properly before this Court as an additional issue. The essence of Debra's claim is that that the running of the statute of limitations on or before April 20, 2007 created in her the vested right to assert the bar as a defense, and that the 2011 Legislature recognized such vested right in its statutory scheme. However, even if this Court disagrees that the 2011 Legislature intended to recognize her vested rights, Debra asserts that the 2011 Amendments cannot take away those rights as a matter of law, as discussed below.

The theory espoused by DHW is that the Amendments authorize DHW to "renew any Idaho child support judgment currently being enforced[10] by the Department, which otherwise could be deemed to have expired since July 1, 1995." [DHW Motion, p. 2] Plaintiff does not believe that was the intent of the 2011 Legislature. As the discussion in Section A above shows, the clear and unambiguous language of the Amendments reflects otherwise. However, in the event the Court disagrees with Debra's position, Debra asserts that the applicable statute of limitations barred actions both to renew the original judgment and all actions to enforce the same on April 20, 2007

[10]There is no known reason, either legal or otherwise, why the "current enforcement" language referred to DHW would or should have any effect whatsoever on the issue of retroactivity or why such a provision would or should determine whether a statute of limitation expired or not.

at the latest, and any attempt by the Legislature to resurrect the judgment must fail as an unauthorized extension of its legislative authority.

Thus, the issue before this Court is therefore whether a child support order which had previously expired pursuant to the applicable statute of limitations in effect at the time of its expiration may be resurrected by an amendment, applied after the fact of expiration, purporting to extend that statute of limitations retroactively. As is discussed in more detail in the following arguments, once a child support order has expired under the then-applicable statute of limitations, a vested right to assert the bar of the statute of limitations arises, and any subsequent attempt to revive or resurrect it must fail as a matter of law.

Roark v. Crabtree, Utah, 893 P. 2d 1058 (1995), although not an Idaho case, is a case on point and offers a thoughtful discussion of the pertinent issues which Debra hopes this Court will find persuasive. Furthermore, the *Roark* opinion espouses the majority rule,[11] which Debra hopes this Court will follow.

In *Roark* a female plaintiff filed a civil action for damages against a man arising out of alleged sexual assaults against her while she was a teenager and under the age of 18. Under Utah law, all claims arising from such alleged abuse were tolled until she was 18 years old. Thereafter, tort claims for assault and battery had to be brought within one (1) year and claims for intentional infliction of emotional distress within four (4) years, *i.e.*, December 1, 1980, or be time-barred by the applicable statute of limitations. No lawsuit was filed prior to December 1, 1980.

Some twelve (12) years later, in 1992, the Utah Legislature passed §78-12-25.1, Utah Code, a statute entitled "Civil Actions for Sexual Abuse of a Child" (the "Sexual Abuse

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[11] *Roark* at 1063.

Amendment"). Pursuant to the Sexual Abuse Amendment, a person was allowed to file a civil action "for intentional or negligent sexual abuse suffered as a child within four years after discovery of the sexual abuse." [emphasis added] *Roark* at 1060. Roark in 1993 filed her civil action on the basis of the Sexual Abuse Amendment and the allegation that she only recently discovered the connection between the sexual abuse suffered as a child and her current (*i.e.*, 1993) extreme mental and emotional distress.

The trial court dismissed Roark's complaint on Crabtree's motion to dismiss on the basis that "Roark's claims were time barred under the pre-1992 statutes of limitations and that section 78-12-25.1 could not be applied retroactively to revive those claims." *Roark* at 1060.

Plaintiff recognizes that in the *Roark* case the Utah Legislature had not opted for retroactive application of the Amendment, whereas in the case before this Court DHW has asserted that the Idaho legislature has manifested its intent that §§11-1110, 11-1111 and 5-254 be applied retroactively. However, as argued in Section A above, that fact is of little, if any, consequence to this case because the retroactivity provision is not binding, and Legislative intent was determined from the amendments themselves. The rule of decision in *Roark* is based entirely upon whether the defense of statute of limitations is a vested right and not upon legislative intent. Indeed, the only reason legislative intent was even discussed in *Roark* in the first place was because it was raised by Roark as a reason to apply the Sexual Abuse Amendment retroactively, even though not mandated by the Utah legislature.

The *Roark* Court specifically defined the issue it was deciding as:

> whether the defense of statute of limitations is a vested right. Phrased differently, can a claim which was barred under the then-applicable statute of limitations be revived by a subsequent extension of the limitation period?" *Roark* at 1062.

The *Roark* Court answered the question in the *negative*, following the majority rule and citing a number of authorities therefor: *Davis & McMillan v. Industrial Accident Comm'n*, 198 Cal. 631, 246 P.1046, 1048 (1926); *Corbett v. General Eng'g & Mach. Co.*, 160 Fla. 879, 37 So.2d 161, 162 (1948); *Spitcaufsky v. Hatten*, 365 Mo. 94, 182 S.W.2d 86, 104 (1944), *overruled on other grounds, Director of Dept' of Revenue v. Parcels of Land Encumbered with Delinquent Tax Liens*, 555 S.W.2d 293, 297 (Mo.1977); *Waldrop v. Hodges*, 230 N.C. 370, 53 S.E.2d 263, 265 (1949); *Dunham v. Davis*, 229 S.C. 29, 91 S.E.2d 716, 718-19 (1956); and the following citation from 51 Am.Jur.2d *limitation of actions* §44 (1970):

> "[T]he great preponderance of authority favors the view that one who has become released from a demand by the operation of the statute of limitations is protected against its revival by a change in the limitation law." Accordingly, "after a cause of action has become barred by the statute of limitations the defendant *has a vested right to rely on that statute as a defense . . .* which cannot be taken away by legislation . . . or by affirmative act, such as lengthening of the limitation period." [emphasis by italics maintained in citation; emphasis by underling added]

Although the undersigned has yet to find an Idaho case directly on point, there are a number of Idaho cases which recognize the existence and sacrosanct nature of vested rights and strongly suggest the same result as the *Roark* case cited above. For example, in the case of *In the matter of Hidden Springs Trout Ranch, Inc. v. Allred*, 102 Idaho 623, 636 P.2d 745 (1981) an applicant for a water appropriation permit claimed he was negatively affected by an amendment to the Idaho Code while his application was pending. *Hidden Springs*, pp. 745-746. Although the *Hidden Springs* court ultimately determined that the applicant in that case had no vested right that was affected by the subsequent legislation, it is its discussion of vested rights themselves which is critical for purposes of this case. First, the *Hidden Springs* court recognized the importance of "vested rights," meaning "already existing rights." *Hidden Springs* at 746. Secondly, it held at

747 that because the applicant's right was not such a right, it was "not therefore a right rising to any vested level which would preclude application of the amended [statute]." [emphasis by underlining added] Needless to say, if the right in question in the *Hidden Springs* case had been vested, the amended statute would not and could not have been applied to negate it.

In *Engen v. James*, 92 Idaho 690, 448 P.2d 977 (1969), the Idaho Supreme Court, in construing whether a retired policeman's vested pension rights could be negatively affected by an act passed by the Legislature after his retirement, observed at 980 that "if respondent [the retired policemen] had acquired pension rights under [the statute in place at his retirement], those existing rights could not be taken from him by a later act of the legislature." [emphasis by underlining added]

In *Olsen v. J. A. Freeman Co.*, 117 Idaho 706, 791 P.2d 1285 (1990) the Idaho Supreme Court reviewed the trial court's summary decision that Olsen's cause of action was barred by Idaho's products liability statute of repose. *Olsen* at 1287. In concluding that the statute of repose was a legitimate exercise of the Legislature's authority, the *Olsen* Court cited with approval the case of *Rosenberg v. Town of Bergen*, 61 N.J. 190, 293 A.2d 662, 667 (1972) for the proposition that the Legislature has the power "to abolish rights that have not yet vested," [emphasis added] as reflected in the *Rosenberg* Court's ruling [293 A.2d at 667] that "[t]he Legislature is entirely at liberty to create new rights or abolish old ones as long as no vested right is disturbed. *Olsen* at 1298. [emphasis added].

In *Ben Lomond, Inc.v. City of Idaho Falls*, 448 P.2d 209, Idaho, (1986) the Court at 214-215 recognized that "prevailing zoning ordinances" gave the applicant of a building or use permit a vested right at the time of filing for the permit, and the city's belated attempt to change the

applicable zoning ordinance was ineffectual. [citing] *State ex rel. Ogden v. City of Bellevue*, 45 Wash.2d 294, 275 P.2d 899 (1954)

The case of *State v. O'Neill*, 118 Idaho 244, 796 P.2d 121 (1990) is likewise instructive. Although *O'Neill* is a criminal case, the *O'Neill* Court identified and discussed the existence and importance of a vested right in a statute of limitations, which parallels the issue in this case. In so doing, the Idaho Supreme Court cited with approval the following pertinent language from Washington Supreme Court case *State v. Hodgson*, 108 Wash.2d 662, 740 P.2d 848 (1967) *cert. denied*, 485 U.S. 938, 108 S.Ct. 1117, 99 L.Ed.2d 277 (1988):

> . . . statutes of limitation are matters of legislative grace; they are a surrendering by the sovereign of its right to prosecute. Since they are measures of public policy only, and subject to the will of the Legislature as such, they may be changed or repealed in any case where the right to a dismissal has not been absolutely acquired by the completion of the running of the statutory period of limitation.
>
> This is not to say that a prosecution once barred by the running of the applicable statute of limitation can be revived by the Legislature. It cannot be. The classic explanation is that of Judge Learned Hand: Certainly it is one thing to revive a prosecution already dead, and another to give it a longer lease of life. . . .
>
> Accordingly, "[u]ntil the statute has run it is a mere regulation of the remedy . . . subject to legislative control. Afterwards it is a defense, not of grace, but of right, not contingent, but absolute and vested, . . . not to be taken away by legislative enactment." . . . [emphasis by underlining added; quoted material retained]

The common thread among the cases cited above is the recognition of the existence, validity, and importance of vested rights and the fact that once possessed, such rights cannot be taken away by subsequent legislation. In this case Plaintiff had the "vested or already existing right" to assert the statute of limitations defense to an action by Defendant to renew the child support judgment against her. That right accrued not later than April 20, 2007. At the same moment, any right to renew the judgment on the part of Defendant or the State of Idaho on his

behalf died and remained dead until 2011, when the State attempted to renew the judgment, alleging that the 2011 Idaho Legislature had decreed that the right of renewal had been resurrected. Plaintiff respectfully disagrees and urges the Court to adopt the rulings discussed above.

VI. CONCLUSION

An integral part of the statutory scheme promulgated by the 2011 Idaho legislature is the provision in §10-1111 that in order for the statute to apply retroactively, a judgment must be renewed "prior to the expiration of the lien created in section 10-1110 . . .." In this case, since the lien created in §10-1110 expired, at the latest, on April 20, 2007, it is now impossible to renew the judgment and, of course, impossible to apply the amendments retroactively.

Regardless of the 2011 amendments, it is legally impossible for the Legislature to retroactively abolish a vested right. Plaintiff's right to assert the statute of limitations defense is such a right, and the judgment of the magistrate court must also fail on that basis alone.

DATED this 27th day of September, 2013.

Richard L. Harris, Attorney for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I mailed via US Mail, first-class postage prepaid, a true and correct copy of the foregoing RESPONDENT'S BRIEF to the following on this 27th day of September, 2013:

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